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# Acta et Arcana: Latency Management and the Law

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# Acta et Arcana: Latency Management and the Law

## **Abstract**

Archive Fever is a memorable title, used on the occasion of a memory conference (a most fashionable topic at the time) almost precisely 24 years ago in London, June 5th 1994, by the late Jacques Derrida. In retrospect, 24 years later, the thematic switch from memory to archive has become an evident move. Evidently, archives offer what may be called the literal, material groundwork for memories in many ways. The simplest, if somewhat metaphorical instance is the box, for example the shoe-box, in which we keep family photographs or tax receipts. In a different metaphorical vein, of generalisation instead of specification, a storage of electronically available items in so-called computer files exemplifies the literal, material meaning of the word archive in its historically most pertinent, for some time undervalued, but by now all of a sudden urgent role.

## ***Acta et Arcana*** **Latency Management and the Law\***

**Anselm Haverkamp**

*Archive Fever* is a memorable title, used on the occasion of a memory conference (a most fashionable topic at the time) almost precisely 24 years ago in London, June 5<sup>th</sup> 1994, by the late Jacques Derrida. In retrospect, 24 years later, the thematic switch from memory to archive has become an evident move. Evidently, archives offer what may be called the literal, material groundwork for memories in many ways. The simplest, if somewhat metaphorical instance is the box, for example the shoe-box, in which we keep family photographs or tax receipts. In a different metaphorical vein, of generalisation instead of specification, a storage of electronically available items in so-called computer files exemplifies the literal, material meaning of the word archive in its historically most pertinent, for some time undervalued, but by now all of a sudden urgent role.

In 1994 Derrida began with an examination of the word archive's ancient Greek meaning, deriving from *arché*, highlighting the ambiguous double of commencement and commandment, which continues to threaten and destabilise the actual functioning of what the archive, from its Greek origin until now, was to guarantee, namely, the adequate transmission of its nomo-logical mission: the actuality of the *nomos*, its embeddedness of old in mythical narratives notwithstanding. The archive was invented to shelter the authority or command-structure of a given *nomos* in the light of one (in many ways uncertain) 'primal

scene' of origin – even and particularly against the grain (if necessary) of the mythical distortions provided by historically distorted narrative recollections of any nomo-logical foundation whatsoever (Derrida, 1995).

Derrida did not fail to mention the institutional follow-up, the epochal Roman turn that occurred with the archival translation into Roman legal routine; the Roman *actualitas* of the Greek conception of the *nomos* is most telling. The Latin *translatio* of the archive's Greek *arché* to Rome – a translation that haunts the Roman genealogy of the transmission of power, the *translationes imperii*, for centuries to come – includes a history-forming effect of its own. In this process, the rift between a contingency of origins (on the one hand) and the institutionally guarded validity of norms (on the other hand) changes the original picture considerably. To put it tentatively for a start, and as brief as possible: the archive, formerly an institution of origins, comes to re-define the Roman *institutio* in terms of legal procedure: of the law's con-stitution as in-stitution. The Latin term, which redefined and further determined what the archive is an archive of, is *acta*, the acts performed in legal procedures, whereas the box, the Latin *arca*, contains the hidden preserve of presumably pre-legal, violent origins as notoriously infamous *arcana imperii*. The historical primal scene of such an extra-legal beginning has been recorded in the memorable mis-en-scène of the historian Tacitus' *Annales ab excessu Divi Augusti*, an event closely connected with the constitution of the new *imperium* after Augustus – of an empire, which derived its name and nature from this first translational act of imperial power and became a fearful model for the *translationes imperii* to follow; Machiavelli became its early modern theorist.

Let me begin, therefore, with the defining Roman content of the archive, the *acta senatus*, as they have been put on the map by Cicero, more than a century before Tacitus. In a fairly well-known passage of his book on laws, the *De legibus*, he bewails the sad state, and thus the great urgency of the sad state, of the *acta senatus*, which he describes in dire need of archival care. The institutional background of his remark is the

replacement of the ancient Twelve Tables (an interesting institutional forerunner of legendary proportions, which was for Cicero, as he puts it elsewhere ironically, *De oratore* 1.245, of the rather sentimental value of a schoolmaster's rhymes) by an archive of the actual legal proceedings, the *acta senatus*, or, closer to the constitutional point documented in Cicero's book, by an archive in the place of the more systematic framework for Rome's political institutions, a constitutional framework that comes tentatively into view in this late and ultimately unfinished republican account from the end of Cicero's career.

Extremae leges sunt nobis non usitatae, rei publicae necessariae. **Legum custodiam nullam** habemus (no administrative curator) itaque eae leges sunt quas apparitores nostri volunt: a librariis petimus, publicis litteris consignatam **memoriam publicam nullam** (no public record) habemus. Graeci hoc diligentius, apud quos νομο-φυλακται (guardians of the law) creabantur, **nec ei solum litteras** — nam id quidem etiam apud maiores nostros erat —, **sed etiam facta hominum** observabant ad legesque revocabant (*De Legibus* 3.20.46).

There is no technically adequate translation available that would be able to bring out the point of Cicero's intervention and put it into the wider context of his more precisely constitutional concerns. It is only in contrast to the guesswork of translators that this concern becomes clear. Thus, the usual Loeb-translation gives ample opportunity to move on to a closer look at the Latin original's more specific terms:

The last of the laws mentioned (among them the Twelve Tables) have never been in use among us, but are necessary for the public conscience (*memoriam publicam*). We have no guardianship of the laws, and therefore they are whatever our clerks want them to be; we get them from state copyists, but have no official records. The Greeks were more careful about this, for they elected (so-called) "guardians of the law," who not only kept watch over the text of the law, as was formerly done by our forefathers, but in addition they observed men's acts (*facta hominum*) and recalled them to obedience to the laws (Keyes 1928: 513-15).<sup>1</sup>

Evidently, the eager, law-abiding conclusion – the ‘recall to obedience’ – needs a refocusing, the central term *memoria* to begin with. *Memoria* is a technical term that refers to the most basic competence of the able lawyer, namely, to know not just the laws but cases and causes by heart in order to argue freely and effectively. The ancient precedence of the Twelve Tables – Cicero’s nursery rhymes, which Quintilian shall call outrageously inapt – is of no help. Cicero’s concern is not obedience, but a technicality that arises in the context of a lawyer’s mnemo-technical ability and, that means, availability and sustainability of the constitution: We have (Cicero says) no curators of laws – *legum custodiam nullam* – and no public memory – *memoriam publicam nullam* – with the technical implication of having no reasonable access to the necessary precedents. The Greek invention of the archive, its purpose and its officials, included νομοφυλάκται, *nomos*-guardians, in whose *cura* it is essential to have *nec ei solum litteras* (those existed of old), *sed etiam facta hominum* – not just written prescripts and results, but the relevant *facta* (*facit* being the last word of a verdict), that is, a record of cases that should be ready at hand for further reference of action and decision.

We recognise here the application of one crucial distinction featured by the rhetorician Cicero on the occasion, a distinction refashioned in Erasmus’ *De Copia rerum et verborum* (1512) and, after Erasmus, in Michel Foucault’s *Les mots et les choses* (1966), of *res* and *verba*. Not just the literal record of *verba*, but its factual point, the *res* or *causae*, need to be available to the public – a public that is, however, not yet a public sphere of general participation, but the law-makers’ of the senate only. The *acta senatus* were *acta confirmata a senatu* (as in Cicero, *Philippica* 2.100), confirmed by the senate, and in this limitation, as *confirmanda a senatu*, they were for Cicero *res publicae*. Merguet’s Cicero-lexicon lists as meanings for *acta* “deeds” (that is *facta*, as in *facit*): the finalised action as a performance in both senses, of negotiation and trial (Merguet 1905-6: 12). Thus, the methodological question to be considered would be: what is the performative point implied in the acts to be kept and cared for in the archive?

The structural point implied is of a strictly procedural rather than

ideological nature, as the reference to the archaic Twelve Tables, the foundational form and figure of the earlier Roman archive confirms. The function of the desired new archive is more than that of mere piety in the face of the model cases of a bygone exemplary severity (the proverbial brutality of the Twelve Tables). The *facta* to be kept ready as the *acta* of the new archive (which was most likely established as a *tabularium* at the *Basilica Julia* in the year 47 CE) were mobile, to be circulated. Their movement redefined the space and reach of the law as administrative medium beyond the republican desire that is presented by Cicero as a last visionary act of the republican era (Nicolet 1994: xiv-xvi). It had to cope with the complexity of a vaster reach of power, whose public interest was no longer manageable by a comparatively transparent governing body like the old republican senate. It may be described as one first version of a more advanced type of social systems where, in difference to the simpler 'archaic' system, the premises of the decision-process ask for more abstract procedural rules, in which the personal or party interests and histories are in their institutional groundwork separated from the juridical sphere of the legal proceedings themselves (Luhmann 1969: 71). The public interest to be guarded in the archive was the radical impartiality of process.

Let me confront this state of affairs in Cicero's illusory, but illuminating picture of the vanishing *res publica* with the fatalistic account that has been carefully designed and stylised after the downfall of the republic by Tacitus (roughly 150 years after the *De legibus*) of the new empire's constitution, in which the Augustan fiction of a renovated *res publica* had soon collapsed and found itself differently renewed as the continuing *imperium* of the Caesars. In spite of the administrative usefulness of the new archive as a structurally apt answer to new functional demands, a hidden and almost archaic moment returned. No outdated ancient sub-structure like the Twelve Tables, but a brutal factual occurrence, not fit for the archive like the ordinary legal acts and *acta*, but a murderous *facinus*, a deed, that as un-documented *factum* retreats into the depth of an arcane mystery of the state, as it is named in ironic reference to the formerly sacred, by now utterly profane foundations, of the new state called *principatus*: the *primum*

*facinus novi principatus*, the murder of Agrippa Postumus, the first deed of the succeeding successor Tiberius (*Annales* 1.6.1), is legally masked, Tacitus reports, tongue in cheek, as an *arcanum domus* (2.36.2), the arcane necessity without legal justification that shall inform all further *arcana imperii* of this and similar houses (*eiusmodi similes* is the laconic *formula* of future times) (Ewig 1954: 189–219). The distinction proposed by Henry Furneaux in his commentary of the *Annals* characterises the role of this first and exemplary instance, *primum facinus*, as the *ratio* of the *arcana domus* (1.6.6) for the sphere of the ensuing *arcana imperii* (2.36.2), in the promotion from ‘secret principles of autocracy’ to ‘secrets relating to the constitution’ – to a constitution governed by imperial autocracy (*Historiae* 1.4.2) (Furneaux 1896: I 187, 327). Interestingly, strangely, the archive undergoes in the very moment of its institution as *tabellarium* in 47 CE, a significant split that shall hold for the centuries to come, between the heightened administrative efficiency of legal institutions and the scandalously autocratic idiosyncrasy of the Caesars in power. Roman governmentality came up with an efficient counter-measure to the threat of the unreliability enacted by tyrannical autocracy, by a relapse into Greek *tyrannis* that was no longer a far cry from Roman dictatorship (be it the brutal administrator Sulla or the clement Julius Caesar, not yet to speak of terrible Nero); Suetonius’s *Vita* of Tiberius’s Greek caprioles in Capri provides ample evidence of that new dimension of power.

The archival conflict of commencement and commandment recognised by Derrida undermines the constitution of the new empire by a cryptic doubling of administrative records with a non-official sphere of arcane knowledge, that applies only to members and friends of the imperial house as a *condicio imperandi* that is based upon the ruler’s *condicio vivendi* (as satirically anticipated by Horace, secretary to Augustus, no lesser man, in his *Satires*, 2.8.63). The fact that this *ratio constat*, as Tacitus states – meaning ‘it is good’ or ‘is reasonable’ – is relevant not in terms of justifiability but of administrative consequence: ultimately, the *arcana imperii* persist, Furneaux remarks, in ‘making those chosen’ – like Sallustius Crispus in the first place, of Tiberius’ murderous accession, as *particeps secretorum* (1.6.6) – ‘more independent



(of the imperial holder of power), and those not chosen more disaffected' (Furneaux ad 2.36.5). The transfer from constitutional foundations, while still of greatest ideological importance – their non-foundation, in fact – to the administrative technologies of procedure remains the crucial point. Tacitus was maybe not the first, but certainly the most effective proponent of this type of structural-functional diagnosis, whose system-theoretical advocate is Niklas Luhmann. For historians of literature, Tacitus provides major access to the juridical underpinnings of a stage like Shakespeare's, whereas Luhmann adds to the historical learning of literary 'self-reference' (his central evolutionary achievement) the melancholia of a social description unable to find its way back to Cicero's ideal analysis of the lost republic.

What, then, makes the archive such an attractive, such a desirable place today? In the light of its Roman adaptation and also, more precisely, of its relapse into proverbially 'Greek' conditions, Derrida's diagnosis of *Archive Fever* is suggestive. The return of a primal scene of commencement that is enclosed in the archive – whether now Moses's Ten Commandments or Rome's Twelve Tables – appears in a different light. The *arcana* of the ruling house, the corpses in the basement (*in arcis*, in the coffins informing the archive) reset a stage and un-mask in the shelter of its arcane mysteries the un-grounded, quasi-mystical *fundamenta in re*. State administration takes over, and the false Machiavellian glamour of valiant illegitimate power and usurpation appears as the mere after-image of a theocratic epoch that is finally reduced to the side-effects of a system's logic or, closer to home nowadays, this system logic's so-called 'mediality'. It looks, if only fleetingly, momentarily, as if the hard-core facticity of the *facta* stored in the archive – or, to be less optimistic, the *facta* **not** lost in, or with, the archive – would open new ways to re-negotiate the underlying layers of norms – juridical, ethical and, last but not least, aesthetical. As a matter of fact, the aesthetic investment in the archive may be the oldest, since it leads back to the shared roots of law and literature in Greek tragedy, to the shared interest in justice, overseen by tragedy's goddess *Themis*, to a justice administered and irrevocably contained in the corruptible letterality of texts – the 'justice of texts' transmitted in texts, whose

textuality is of an essentially archival nature and does indeed keep, like the guardians of the Greek *nomos*, Cicero's νομοφυλακοί, the *facta* in both senses, of *res* and *causae*, which are embedded (as Cicero admits and would be the last to deny) in, and under the condition of the *verba* performed, and stored as performed, in the archive. For Cicero and historical archives up to now, textuality determines their keeping in the archive. An archive is no museum of all artefacts worth the keeping, but mainly of books in their many states of aggregation and transmission. Still, textuality as such is not only bookish, although it may be, for the most part, media-related, and here we certainly have to specify and enlarge the scope of what is to be found in the archive. Thus, Derrida finds, 'the technical structure of the archive determines the structure of the archivable content, even (in retrospect) in its very coming into existence and its relationship to the future. The process of archivization produces as much as it records the event' and, as a result, textual and media technologies determine 'the very institution of the archivable event' (Derrida 1996: 17-8).

Already for Cicero, the importance of movement and its technical implications were central. Cornelia Vismann was one of the first to pay attention to the circulation of files, which redefined the *acta* as a form of textual mobility, a formal quality shared by law and literature alike and from the start (2011: 111). Against the commonplace that takes the archive as synonymous with the immobile presupposition of arcane origins, the mobility of the *acta*, in contrast to the persistence and intransigent stability of the *arcana*, turned the archive into an institution of juridical virtuality. The conflict incorporated in the archive guards both, the stability of a 'good old law' – the good old laws' reliability as documented in their age-old uses – and the flexibility of continuing re-application or re-iteration. To put it in the words of a recent title by Christoph Möllers : the archive enables *The Possibility of Norms* – not their mere (more or less genuine) legitimacy, but a genuine movability, which includes adaptability, but also, and ultimately, sustainability (Möllers 2015). Now, surprisingly, we come closer to the hidden, but crucial point of Tacitus's *arcana imperii*. The transference of power, *translatio imperii*, has been transferred from the necessary 'giving in'

to the given *arcana domus* to the historical re-vision of the more or less adequate procedures of transmission. The archive is meant to enable, from Cicero's *De legibus* onwards, both store and keep available (with the more or less certain truth claim to justice being done) the possibility of revising in the act the procedures by which justice was done or, not to forget, was actually (and often enough) missed by the law. The shift from the stability of truth-guarding measures of application to the re-adjusting of legal norms of procedure comes to the fore, and that is also relevant for the archive's most recent actuality. The archive's inbuilt 'historicity' – critical legal history, in short – turns out to be the precondition of the adaptability and sustainability of legal decisions alike.

In a seminal article of 1919 on the so-called 'good old laws' – unwritten and in no need of archives – Fritz Kern had supplemented his ground-breaking thesis on the medieval 'right to resistance' as a deeply ingrained trait of medieval constitutional law, and he had bridged thereby also the gap, that had widened in the reception of Roman law after Cicero's memento had found itself subjected to the ludicrous power plays of the Roman emperors (Kern 1919: 1-79).<sup>2</sup> The double structure of the archive, of filing technologies and their arcane underpinnings, continued in the early Middle Ages in a modified form, but on a radically inverted groundwork. The royal Carolingian court chapel, *capella*, cited and literally incorporated the relic of Saint Martin's *capa*, upon which the *capella* was erected. In an intricate turn of *interpretatio Christiana*, the *translatio imperii* from the Roman empire to the Carolingian court became the prototype that replaced the archaic Greek *arché* of Roman law by a Roman imperial soldier's *caritas*: by an officer who shared his *capa*, the glorious *signum* of his military uniform, with a beggar who turned out to be Christ. At the centre of the archive, the *capa* signified in a doubled metonymy, the origin **and** its *translatio*, in that the *capella* (diminutive of the *capa* encrypted) as the chapel of the medieval kings included both, the historical memory of the constituting Roman gesture of *caritas* and the mobile administration of the *imperium* that was re-founded in that act of translation (Fleckenstein 1959-66: I 226). I shall not go further into the symbolism involved; suffice it to say

here, that the crypt of the non-public *arcanum* of a primal Roman act of usurpation (Tiberius and the imperial aftermath) is replaced by the memory of foundational charity (the Roman officer Martin's), and the function of origin and institution is reinterpreted by a new principle, the principle of no new *princeps*, but of the sharing act performed in the translation itself (Haverkamp 2006: 19-30).

The unspeakable (nevertheless well-known) *arcana domus*, which had perverted the Greek presupposition of a violent act of imposition and had in Tacitus's account superseded, out-ruled, the republican control of the *acta senatus*, are transposed into the different key of a shared act of communal virtue – an entirely new constitution (that is, no new covenant, though often mistaken as one, of the Old Testament type). As a relic, the Saint Martin's *capa* does not speak like *acta* do; it is a *sym-bolon* of the ancient kind, no writ. It rivals, but also inaugurates a new type of *acta*, which are meant to serve as the cornerstones of a *bibliotheca ecclesiae*, the *acta apostolorum, sanctorum, or martyrum*, witnessing the Christ (Breslau 1889: I 128). On these symbolic grounds, the Carolingian *arcanum imperii* of Martin's *capa* re-membered and, that is, united the *acta* of the archive under the ostensibly different heading of negotiation (and no new commandments handed down like Moses's).

The handbooks of archival discipline like Harry Breslau's, from which I have cited, do not fail to mention the dubious role of the new, post Roman tendency towards the functional differentiation of documents that will define the archive of modern times, of proof, testimony, disposition, discretion: from the charters proper, of *carta* and *notitia*, to the different types of writs, deeds, documents, instruments – the archival lexicon is testimony of a large variety of *acta* in their acting and performing capacities (von Brandt 1958: 97). Research of and in archives flourishes on this administrative level in ever greater positivisms, while the deeper foundational level has sunken under the surface of changing ideological interest-formations. What remains, is the formal double of a flexible, variable syndrome of actualisation or application and, that is, the technology of procedures, with an historically grown normativity of their own, based upon an arcane,

but literal fiction or unquestionable presupposition, which is both, conditioned by the force of law and, at the same time, relieved of its latently violent underpinnings and appears as transformed into the equally fictitious normativity of so-called human rights.

One item sticks out of this picture as a bone of political contention and swims on the political surface of public concerns for several centuries now, the sovereignty complex. It is genuinely modern and still of a burning urgency. Notably the sovereign of Baroque mourning plays (historical tragedies in the wake of Shakespeare's theatre) needs as proof of his power, as Walter Benjamin flatly stated, the 'gesture of execution' – a proof that made the corpse 'the emblematic requisite as such' (no coffins in a crypt but their hanging from the public gallows) (Benjamin 1972: 249). Benjamin's observation describes the perversion of the finally failed and failing *translationes imperii* as the sad *arcantum* of modern politics: of a political dimension exposed in plays, which mourn the inescapable tragedy called History. The medieval *Divine Right of Kings*, which had been converted from Roman rule to Christian charity, has expired and its arcane place in the archival administration of a Holy Roman Empire re-invested, as in a return of the Roman repressed, by the power of new rulers, the Machiavellian princes of usurpation.

Henry Bracton, author of *The Laws and Customs of England* (before 1235), had still managed to double-bind the *Divine Right of Kings* in its *re-ligio* to the law and thus limited the king's frivolous stance above the law, instead of *supra legem*, to a legitimacy in equal parts *sub deo et sub lege* (we may recognise, again, in this *formula* the double structure met by the double *deus et lex*) (see Haverkamp 2013: chapter 4). For Shakespeare, *Richard II* was the exemplary tragic instance. The dreadful *arcana imperii*, the boxes of corpses since Tiberius's time, take over and *arca* turns out to be a nasty pun; they return and carry on the cover name of sovereignty as inescapable curse. The metaphorical transfer of the archival substructure from the kings of nations to their so-called people failed because *translatio* remained the cover for a latently active power structure. A structure, that had returned in Rome after Cicero's republic; had returned in its European *translationes*, and did so to no

lesser degree in the legal compromise of a so-called Common Law. It continues to do so, return unquestioned in its metaphorical force and fatalism, in today's Europe. No mercifully shared 'cope' anymore (from *capa*), but only self-centered -exits seem left. No Madonna of Mercy is (however implicitly) present any longer, no welcome under the twelve *maris stellae* of the European flag, last evidence of the archive's double structure (the arcane centre of the flag is empty). Sovereignty did once bind the laws, indeed, but no shared justice followed in the name of the sovereignty claims that stem from the archival non-foundation of the neo-liberal, pardon, fake-republican house of the Caesars, whether Tiberius, Nero, or Borgia (see Grau 2015). We are left with Tacitus and the wicked Machiavells, and with Cicero as a vanishing screen memory – like Erasmus, like Socrates and the other European stipend names that haunt, without much prospect, the academic vanity fair of our days.



**Figure 1:** Hydrant, St. Martin in the Fields, London

## Notes

- \* Anniversary Colloquium on “Law and Archive”, Birkbeck School of Law, London, June 1st 2018
- 1. The quoted passage is taken from the translation of Marcus Tullius Cicero’s *De Legibus* by Clinton W Keyes (1928: 513-15), my emendations. The translation, misleading and pointless as it is, is widely used, thus most recently on a notorious political occasion by Sarah Bond in ‘Saving Endangered Data From Ancient Rome To Trump’s America’ published in *Forbes Magazine* on 19 April 2017.
- 2. Kern’s article was reprinted in 1952 in *Libelli* III Wissenschaftliche Buchgesellschaft Darmstadt; an English translation ‘Law and Constitution in the Middle Ages’ was published as part II of *Kingship and Law in the Middle Ages* trans. Chrimes S B 1936 Blackwell Oxford and 1956 Frederick Praeger New York.

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